



**Consumer
Focus**
Campaigning for a fair deal

Consumer Focus response to the consultation on setting the value of claims heard in the Patents County Court

December 2010

Introduction

Consumer Focus is the statutory independent watchdog for consumers across England, Wales, Scotland and (for postal consumers) Northern Ireland. Our role is to represent the interests of consumers, particularly those who are disadvantaged. We operate across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do.

The **consultation on setting the limit on the value of claims heard in the Patents County Court** builds on Lord Justice Jackson's **Review of civil litigation costs: final report**, published January 2010. The review included six recommendations relating to intellectual property, the second of which endorses the Intellectual Property Court Users Committee proposals for reforming the Patents County Court (PCC).

The Intellectual Property Court Users Committee proposed that the PCC should be reformed to reduce the significant costs of intellectual property litigation and to provide a cost-effective forum to resolve lower-value intellectual property disputes.¹ A number of the recommendations were implemented on 1 October 2010 through changes to the PCC's rules and procedures. Outstanding recommendations for implementation include a limit of £500,000 on the financial remedies available in the PCC and the introduction of a modified small claims track and fast track for the PCC. This consultation is in relation to the recommendation to implementing a limit on the financial remedies available in a PCC. The Intellectual Property Office (IPO) intends to implement this through secondary legislation, amending section 288(5) of the Copyright, Designs and Patents Act 1988 (CDPA), for commencement in April 2011.²

Consumer Focus welcomes the intent of the consultation and the ongoing efforts to make the PCC an effective forum for resolving lower-value intellectual property disputes. The name of the county court – 'Patents County Court' – is misleading, in that the PCC now has jurisdiction over all the intellectual property rights, ie patents, copyright, trademarks and designs.³ This change in jurisdiction means that the PCC will become the primary forum for copyright disputes involving consumers, as allegations of copyright infringement against consumers will very rarely exceed £500,000 in damages.

Consumer Focus supports the proposal to set a limit of £500,000 on the financial remedies available in the PCC and we support the proposal to change the name of the PCC to 'Intellectual Property County Court'. With an increasing number of court proceedings for copyright infringement being brought against consumers it is vital that consumers have access to justice through the PCC. The proposed steps are, in our view, necessary, but not all the steps required to achieve this goal.

The great majority of cases brought against consumers will involve damages under £500,000 and are more likely to be up to £5,000. The planned implementation of the Digital Economy Act 2010 in mid 2011 is likely to lead to a surge of court action against internet subscribers for alleged copyright infringement through peer-to-peer file-sharing.

¹ Intellectual Property Court Users Committee, **Working Group's final report on proposals for reform of the Patents County Court**, July 2009 pg.7

² **Proposals for reform of civil litigation funding and costs in England and Wales**, Ministry of Justice, November 2010, pg.90; Intellectual Property Court Users Committee, **Working Group's final report on proposals for reform of the Patents County Court**, July 2009 pg.11

³ **Setting the limit, consultation on setting the limit on the value of claims heard in the Patents County Court**, Intellectual Property Office, October 2010, pg.4–5

These cases will be lower-value disputes, involving subscribers who are accused of having infringed the copyright in three copyrighted works, most likely music or film, over the course of 12 months. Independent of the Digital Economy Act an increasing number of copyright owners are in the process of launching copyright infringement proceedings against internet subscribers in relation to peer-to-peer file-sharing. These cases are likely to be lower-value disputes as well, involving the infringement of one copyrighted song, album, game or adult movie.

In light of the likely increase of lower-value copyright infringement disputes involving consumers in 2011, we believe it is vital that the ongoing PCC reforms are progressed rapidly. Changing the name of the PCC to reflect its jurisdiction over copyright, as well as patents, trademarks and design disputes will ease some of the current confusion surrounding copyright disputes. The PCC should aim to provide consumers and copyright owners with a cost-effective and proportionate avenue to resolve such disputes. We therefore believe that copyright infringement disputes involving consumers as defendants should receive greater consideration in the ongoing reform of the PCC.

So far the focus of the reforms has primarily been on small and medium sized enterprises (SMEs) and entrepreneurs, who will frequently be claimants or defendants in lower-value copyright, patents, trademarks and design disputes. While the needs of SMEs, entrepreneurs and consumers are frequently aligned, especially with regard to the cost of disputes, we believe that additional consideration for the needs of consumers is necessary to ensure that consumers who are accused of copyright infringement are treated equitably and fairly by the PCC. We are concerned that the court cases we are aware of, in which consumers were subject to allegations of copyright infringement through peer-to-peer file-sharing, resemble something out of Dickens rather than access to justice. In the worst cases defendants were left with default judgements that awarded damages entirely disproportionate to the damage caused by the alleged infringement. Alternatively defendants were left with claimants' cost being awarded against them as high as £10,000 and £14,000.

Therefore, in addition to providing information on how the £500,000 cap on damages would impact on consumers, we are also providing information on how the revised PCC rules and procedures and the introduction of a modified small claims track and fast track for the PCC is likely to impact on consumers. In this respect we will be sharing this consultation response with the Intellectual Property Court Users Committee and we intend to respond to the Ministry of Justice (MOJ) consultation on implementing Lord Justice Jackson's recommendations.

Summary of recommendations

Consumer Focus recommends:

- that the PCC, which is to be the designated court for lower-value copyright disputes, is reformed with the needs of consumers in mind
- that the PCC should plan for the likely increase in copyright infringement cases involving consumers in 2011
- that the limit on financial remedies available in the PCC should be set at £500,000
- that the name of the PCC should be changed to 'Intellectual Property County Court' in April 2011
- that the PCC should consult with independent economic experts when assessing the damages resulting from copyright infringement by consumers

- that the PCC should recognise that consumers, along with entrepreneurs and SMEs, are key stakeholders, and that the PCC process must meet consumer needs
- that the PCC should evaluate the impact of the changes to its rules and procedures on consumers acting as defendants
- the introduction of a modified small claims track for the PCC, designed so that consumers can defend themselves in lower-value copyright infringement disputes
- the introduction of such a modified small claims track by the end of 2011, when the implementation of the Digital Economy Act will lead to an increasing number of lower-value copyright infringement disputes

Intellectual property disputes and consumers

Intellectual property disputes mostly involve two commercial parties and the alleged infringement of the exclusive rights granted by copyright law, or the licensing terms for these rights. They are most likely to have occurred in a commercial context, ie in the course of business. Consumers are very rarely able to infringe patent, trademark or design rights, therefore disputes about these rights will hardly ever involve consumers. Historically consumers were not able to infringe copyright on any significant scale, though this has changed as digital technologies became available. Since the 1970s consumers are able to infringe the exclusive rights under copyright law using tape or video recorders, which became widely available household items. More recently consumers infringe copyright by format-shifting, ie copying copyrighted content using various hardware and software, such as iPods and iTunes. Since the late 1990s consumers have been able to infringe copyright by making digital files available to the public via the internet or downloading them from other users, for example through peer-to-peer file-sharing networks.

While we are not aware of any court cases ever being brought against consumers for 'home taping' or format-shifting, copyright owners have, since 2005, started to take court action against internet subscribers for copyright infringement through peer-to-peer file-sharing networks. In 2005 the British Phonographic Industry (BPI) initiated proceedings against six consumers in the Chancery Division of the High Court for civil copyright infringement through peer-to-peer file-sharing. In 2007 five consumers were charged in the Teesside Crown Court with criminal copyright infringement in relation to content they had made available on peer-to-peer file sharing networks. Four pleaded guilty, the fifth pleaded not guilty and the charges against him were dropped in 2010. We are also aware of five cases in 2008 in which Topware Interactive obtained default judgements against five consumers in the PCC for civil copyright infringement through peer-to-peer file-sharing.

Court cases against consumers for alleged copyright infringement are a relatively new phenomenon and have so far been dealt with through processes designed to deal with commercial parties. In 2011 the number of cases against consumers for alleged copyright infringement is likely to increase with the implementation of the Digital Economy Act 2010 through an initial obligations code (secondary legislation) in mid 2011. The Digital Economy Act process, supervised by Ofcom, envisages that copyright owners take civil action against internet subscribers who are on the 'copyright infringement list', which, according to the draft initial obligations code, is any subscriber who has been notified that her connection is alleged to have been used for copyright infringement three times in the course of 12 months.⁴ Implementation is planned for mid 2011, and an increased number of court actions against internet subscribers suspected of copyright infringement through peer-to-peer file-sharing can be anticipated for the end of 2011. Independent of the Digital Economy Act an increasing number of copyright owners are in the process of launching copyright infringement proceedings against internet subscribers in relation to alleged copyright infringement through to peer-to-peer file-sharing.

We recommend:

- that the PCC, which is to be the designated court for lower-value copyright disputes, is reformed with the needs of consumers in mind

⁴ **Digital Economy Act 2010**, Section 4 and 7(4)-(6); **Online infringement of Copyright and the Digital Economy Act 2010 – Draft Initial Obligations Code**, Ofcom, 28 May 2010, pg.4

- that the PCC should plan for the likely increase in copyright infringement cases involving consumers in 2011

A £500,000 cap on the financial remedies available in the PCC: impact on consumers

Setting a limit of £500,000 on the financial remedies available in the PCC effectively sets a cap on damages available in the PCC. In the case of copyright infringement, the type of copyright dispute that is most likely to be brought against a consumer, the court can order damages to be paid to the copyright owner.⁵ Therefore the proposal would effectively impose a £500,000 cap on damages that could be awarded against a consumer in the PCC for copyright infringement.

The impact on consumers of such a cap on damages, and the ongoing reform of the PCC more generally, is that cases alleging copyright infringement by consumers are most likely to be brought to the PCC, not the High Court. Complex cases can be referred to the High Court by the PCC, and it is possible that some cases involving peer-to-peer file-sharing will be referred. But on the basis that the damages resulting from the alleged copyright infringement by consumers will very rarely be over £500,000, and are more likely to be up to £5,000, these cases will, in future, have their natural home in the PCC. To reflect this, and prevent further confusion among consumers, we support the proposal to change the name of the PCC to 'Intellectual Property County Court' in April 2011.

We believe that overall it will be beneficial for consumers if copyright infringement disputes are dealt with by the PCC, rather than the High Court. This is primarily because the cost of High Court proceedings are substantial and act as a barrier to access to justice for consumers. Excessive legal costs associated with defending a case in the High Court, and losing a case in the High Court, will make it impossible for many consumers to defend themselves against allegations of copyright infringement. The costs associated with such cases in the High Court are likely to be disproportionate to the damage resulting from the copyright infringement, making PCC proceedings more appropriate.

We recommend:

- that the limit on financial remedies available in the PCC should be set at £500,000
- that the name of the PCC should be changed to 'Intellectual Property County Court' in April 2011

Damages and copyright infringement through peer-to-peer file-sharing

As the consultation document states, 'it is important for you to bear in mind the principle of damages in the UK. The central purpose of a civil law award of damages is not to punish the defendant; it is to compensate the claimant for damage, loss or injury they have suffered as a result of another's acts or omissions.'⁶ Hence damages awarded for copyright infringement are not punitive, but they are meant to reflect the actual damage caused to the copyright owner from the copyright infringement committed by the defendant.

⁵ Copyright, Designs and Patents Act 1988, section 96(2) and 97

⁶ Setting the limit, consultation on setting the limit on the value of claims heard in the Patents County Court, Intellectual Property Office, October 2010, pg.11

To our knowledge the Chancery Division of the High Court has never made an order in relation to the damages in a case of copyright infringement through peer-to-peer file-sharing. In the two cases where a summary judgement was obtained, the claimants did not apply for an order to be made on damages. We are aware of five cases where the PCC has awarded damages against defendants for copyright infringement through peer-to-peer file-sharing. In one instance the court awarded £6,086.56 in damages and £10,000 in costs, which we believe is excessive. Because these were default judgements and the damages were awarded on the basis of the claimant's request we do not believe that they are an accurate indicator of the damages a court would determine in the case of copyright infringement through peer-to-peer file-sharing.

In the US recent cases against consumers for copyright infringement through peer-to-peer file-sharing have led to substantial punitive damages being awarded. In 2009 Jammie Thomas-Rasset was ordered to pay \$1.5 million in statutory damages for uploading 24 songs to a peer-to-peer file-sharing network. *Capitol v Thomas* is ongoing.⁷ In 2009 Joel Tenenbaum was ordered to pay \$675,000 in statutory damages for sharing 30 songs on a peer-to-peer file-sharing network. In 2010 the damages were reduced to \$67,500 on the basis that arbitrarily high statutory damages violate due process and are thus unconstitutional. *Sony BMG v Tenenbaum* is ongoing and both parties have appealed.⁸ Such punitive damages have no basis in UK copyright law and most cases of copyright infringement through peer-to-peer file-sharing are likely to be substantially below the proposed £500,000 cap.

A recent case in Germany, where damages are not punitive and mean to reflect the actual damage, indicates the kind of damages we would expect a UK court to determine. In 2006 a 16 year old teenager was charged with uploading two songs to a peer-to-peer file-sharing network. The teenager had used his father's internet connection to share the songs. The copyright owners claimed that the father was responsible for the copyright infringement and demanded €600 in damages. In October 2010 the court ruled that the father was not responsible for the copyright infringement, though the teenager was responsible and liable to pay damages. The court ordered him to pay €30 in damages. The court determined the damages on the basis that both songs had been made available for others to download for a short period of time, estimating that both songs may have been downloaded by others 100 times each. On the basis of the licence rate that the German collecting society GEMA would usually demand for songs made available through on-demand services for private use, the court held that €15 would be the appropriate license fee for making one song available for download 100 times. Hence the teenager was ordered to pay a total of €30 in damages.⁹

Damages in the UK are not punitive and so most cases relating to copyright infringement through peer-to-peer file-sharing involve damages of up to £5,000. In the case of the Digital Economy Act, subscribers are to be taken to court on the basis that the copyright owner alleges at least three copyright infringements within 12 months. Therefore we expect the great majority of court cases arising from the implementation of the Act to involve damages of up to £5,000.

In recent years a number of copyright owners have claimed that the overall loss to the industry from copyright infringement through peer-to-peer file-sharing is in the millions

⁷ Jeff Leeds, [Labels Win Suit Against Song Sharer](#), The New York Times, 5 October 2007
Jonathan Blake, [US mum is guilty of file-sharing](#), BBC Newsbeat, 19 June 2009

⁸ Jaikumar Vijayan, [QandA: Tenenbaum says he faces bankruptcy after \\$675K piracy verdict](#), Computerworld, August 2010; Rodrique Ngowi, [Judge Cuts Penalty in Song-Sharing Case](#), abc News, 9 July 2009

⁹ [German court sets file sharing damages at €15, not €300](#), Out-Law, Pinsent Masons, 29 October 2009; [Illegale Verbreitung von Musikaufnahmen über Internetausbörse-Landgericht Hamburg entscheidet über Schadensersatzforderung zweier Musikverlage](#), Hanseatischen Oberlandesgericht, October 2010

and billions. Such estimates are established on the basis that every upload or download, or alternatively, every third upload or download, is a lost sale of the copyrighted work. Such calculations frequently use the retail price of the copyrighted work to arrive at the damage caused by the copyright infringement. We think it is unlikely that a UK court would engage in such simplistic calculations. Even if the PCC would choose to calculate damages on the basis that every download or upload is a lost sale at retail price, the damages would only reach the £500,000 cap if a defendant is found guilty of downloading at least 500,000 different songs, assuming a retail price of up to £1 per song. Or alternatively, if the defendant was found guilty of uploading a song to at least different 500,000 users.

Format-shifting and backup of music are not covered by the exceptions of the CDPA and are therefore copyright infringement. In the event that the music industry decides to launch court proceedings against consumers for format-shifting or back-up of music we believe the damages would also be below the proposed £500,000 cap and more likely to be up to £5,000. The music industry has claimed that such non-commercial copying by consumers of works they have purchased causes economic damage to them.¹⁰ Though again, even if the PCC was to accept that every instance of format-shifting is a lost sale, a consumer who is found guilty of format-shifting their music collection of 200 CDs onto their iPod, would have £1,410 damages awarded against them on the basis that every instance of format-shifting is a lost sale at the average retail price for a digital album at £7.05.¹¹

Consumer Focus has long advocated for the introduction of a non-commercial use exception into UK law, covering non-commercial copying of works consumers have already purchased for their own use. We are hopeful that the recently announced review of the copyright framework will lead to an updating of UK copyright law in this respect.

The economic damage to copyright owners from copyright infringement by consumers is subject to considerable debate. Economists do not have a uniform view on the issue and there is a considerable research gap. Especially with regard to copyright infringement through peer-to-peer file-sharing. Different academic and economic studies have come to wildly different conclusions. In relation to copyright infringement by consumers more generally it is important to differentiate between the 'benefit to the consumer' and the 'damage to the copyright owner' arising from a copyright infringement.

In relation to format-shifting the widely quoted economic research paper by EconLaw for GESAC, a European trade association of collecting societies, entitled *Economic analysis of private copy remuneration* assumes that a benefit to a consumer equals economic damage to the copyright owner. It assumes because a consumer who format-shifts a CD onto an iPod does not have to re-buy the CD in digital format to listen to it on an iPod (benefit to consumer), all format-shifting equals a lost sale (economic damage to copyright owner). Such an analysis assumes that consumers would have purchased multiple copies of the same music to play on different formats if they were not able to format-shift (eg CD player and iPod). The analysis also neglects that the increased value consumers derive from being able to format-shift their CDs may increase demand, or the price consumers are willing to pay, for CDs. And the analysis ignores that not having to re-purchase copyrighted works in digital formats will leave consumers with additional money to spend on music and so may increase demand.¹² We therefore believe that the

¹⁰ See **The value of format-shifting to the UK music industry: The music industry hits back at Gower**, Shepherd Wedderburn, 7 May 2008; **Music Business group unveils collective submission on private copying and format shifting**, BMG press release, BPI, 8 April 2008

¹¹ Greg Cochrane, **Digital albums 'getting cheaper'**, BBC Newsbeat, 18 October 2010

¹² EconLaw, **Economic analysis of private copy remuneration**, report prepared for Groupement Européen des Sociétés d'Auteurs et Compositeurs (GESAC), September 2007; Mark Rogers, Joshua Tomalin and Ray

PCC, when having to determine damages to the copyright owners resulting from copyright infringement, should take advice from an independent economic expert.

We recommend:

- that the PCC should consult with independent economic experts when assessing the damages resulting from copyright infringement by consumers

Consumers and proceedings for copyright infringement through peer-to-peer file-sharing

Consumer Focus is concerned that in the past the threat of court proceedings, particularly in the High Court, has been used to pressure entirely innocent consumers into settling claims of copyright infringement rather than defending their case in court. We are also concerned that consumers, who may not have been entirely innocent, settled for amounts that are disproportionate to the damage caused by the infringement or pleaded guilty to the wrong charges, for fear of being exposed to substantial cost if they defended their case in court.

In August 2005 the BBC reported that Sylvia Price, the mother of 14 year old Emily Price, who was accused of copyright infringement through peer-to-peer file-sharing, settled for £2,500. Sylvia Price told the BBC that she had settled because she did not have the money to contest the case. The Guardian reported that Sylvia Price initially had received a demand for £4,000 in compensation to avoid civil action by solicitors acting for the BPI. Her 14 year old daughter was accused of downloading 1,400 songs using peer-to-peer file-sharing networks.¹³ According to the BPI, a trade association representing the UK's four major record labels and a number of SME labels, of the 88 people targeted by its members in 2005 around 60 had settled the cases at the time Sylvia Price was reported to have settled.¹⁴

In 2005 BPI members also initiated proceedings in the high court against six consumers for civil copyright infringement through peer to peer file-sharing, known as Polydor Limited and Ors v Woodhouse and Ors, or alternatively Polydor Limited and Ors v Brown and Ors. In relation to two defendants a summary judgement was made, the cases against the remaining four defendants were discontinued or settled out of court. Nigel Woodhouse was found guilty of infringing the copyright in up to three songs by uploading them to a peer-to-peer file-sharing network in a summary judgement. In his defence Nigel Woodhouse denied that he had infringed the copyright in the claimants' sound recordings and denied that he had issued any sound recordings to the public. The claimants applied for a summary judgement to be made against Nigel Woodhouse, which was granted. In the summary judgement the High Court awarded damages against Nigel Woodhouse, subject to an inquiry as to what damages had been suffered by the claimants as a result of the copyright infringement. The claimants did not seek such an inquiry and the damages were not determined. Costs were awarded in the summary judgement and £14,309.52 of claimant's cost were allowed.

Michael Bowles admitted guilt and was found guilty of making at least one song available to the public through such networks in a summary judgement. In his defence and counterclaim Michael Bowles admitted to using peer-to-peer file-sharing networks and

Corrigan, **The economic impact of consumer copyright exceptions: A literature review**, Consumer Focus, 30 November 2010

¹³ Steven Morris, **Mother faces music for girl's illegal downloads**, guardian.co.uk, 21 June 2005

¹⁴ **Mother to settle web music charge**, BBC News, 20 August 2005

stated that 'I am sorry that it has come to this, as I really did not know I was doing anything illegal. I have never done anything illegal, as my family mean too much to me. I am telling the truth about my money situation, and I think if I have to pay money to the record companies okay but I believe £300 is too much, as I have never made anything from downloading any music, as I said I never sold any. I cannot afford anymore than £10 per week as it is all I have left every week.' The summary judgement makes no provision on damages, but Justice Lawrence Collins provided on cost that 'I will order that no action be taken to enforce for two months, and that Mr Bowles have permission that – if he cannot agree with the claimant's schedule for payment by instalments – he can apply to the court. But I will express the wish that you do take serious account of his personal circumstances and do not simply use him as an example to the rest.' There are no records in the court files that the claimants sought damages or cost from Michael Bowles.¹⁵

In 2007 five consumers were charged for uploading music to other users via the peer-to-peer file-sharing site OiNK.¹⁶ They were charged with criminal copyright infringement under section 107 of the CDPA in Teesside Crown Court. In December 2008 four of the consumers pleaded guilty. Mark Tugwell pleaded guilty to distributing two songs contrary to Section 107(1)(e) of the CDPA. He was sentenced to 100 hours community service and to pay £378 prosecution costs. Steven Diprose pleaded guilty to distributing three songs contrary to Section 107(1)(e) of the CDPA. He was sentenced to 180 hours community service and to pay £378 prosecution cost. Michael Myers pleaded guilty to distributing one song contrary to Section 107(1)(e) of the CDPA. He was sentenced to a £500 fine or in default to serve 14 days imprisonment. James Garner pleaded guilty to distributing one song contrary to Section 107(1)(e) of the CDPA. He was sentenced to 50 hours of community service and to pay £378 prosecution costs.¹⁷ The fifth defendant, Matthew Wyatt, who was 17 when he was alleged to have shared three albums and one song using the OiNK peer-to-peer file-sharing network, pleaded not guilty and in 2010 his case was dropped by the Crown Prosecution Service. His solicitor, David Cook of Burrows Bussin, is reported to have said that Wyatt 'was the victim of a cynical attempt by the record industry to legitimise its heavy-handed tactics and dubious methods by using police resources and the public purse.'¹⁸

Consumer Focus has obtained the certificates of conviction relating to the four consumers who were sentenced and it appears that they pleaded guilty to the wrong charge. They pleaded guilty to Section 107(1)(e), which makes it a criminal offence for an individual to 'distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright, an article which is, and which he knows or has reason to believe is, an infringing copy of a copyright work.'¹⁹ Section 107(1)(e) relates to infringing articles, that is physical articles, such as DVDs and CDs. The appropriate criminal provision for the uploading of music files on peer-to-peer file-sharing networks would be Section 107(2A) of the CDPA, which covers the communication of a copyrighted work to the public to such an extent as to affect prejudicially the owner of the copyright. Section 107(1)(e) carries a maximum sentence of ten years' imprisonment and/or an unlimited fine, Section 107(2A) carries a lower maximum sentence of two years' imprisonment and/or an unlimited fine.²⁰

¹⁵ Polydor Limited and Ors v Woodhouse and Ors court record documents, obtained by Consumer Focus

¹⁶ **Six charged in music share probe**, BBC News, 12 September 2008; Rosie Swash, **OiNK founder appears in court**, guardian.co.uk, 24 September 2008

¹⁷ Certificates of Conviction, Teesside Crown Court, obtained by Consumer Focus

¹⁸ Nicola Kobie, **Middlesbrough Crown Court has dropped a case against a teenager for file sharing**, ITPro, 31 March 2010

¹⁹ **Copyright, Designs and Patents Act 1988**, Section 107(1)(e)

²⁰ **Copyright and trade mark enforcement notebook for Trading Standards officers**, Intellectual Property Office, pg.8 and 9

In early July 2008 Davenport Lyons on behalf of Topware Interactive reportedly obtained a summary judgement against four individuals accused of infringing the copyright of the video game Pinball 3D through a peer-to-peer file-sharing network. The defendants were not present nor represented, and reportedly £750 in interim damages and £2,000 in interim costs were awarded against each in default judgements.²¹ In late July 2008 David Gore of Davenport Lyons obtained a further default judgement against Isabella Barwinska in the PCC, again for sharing a copy of Dream Pinball 3D on a peer-to-peer file-sharing network. Again the defendant was not present or represented and damages of £6,086.56 and cost of £10,000 were awarded against Isabella Barwinska.²² Isabella Barwinska was reportedly an unemployed, single mother of two living in Canning Town. Following the default judgement Davenport Lyons reportedly threatened that non-payment by Isabella Barwinska would result in further legal action.²³ The game in question retailed for between £16 and £9 at the time and David Gore of Davenport Lyons reportedly stated in relation to Barwinska's case that 'The damages and costs ordered by the court are significant and should act as a deterrent'.²⁴

Since 2007 a number of solicitors have engaged in what has been termed 'speculative invoicing', where internet subscribers are sent a letter stating that their connection has been used for copyright infringement and demanding payment to avoid court action. In relation to such activities the Solicitors Regulation Authority (SRA) has now referred the following three solicitors to the Solicitors Disciplinary Tribunal: David Gore of Davenport Lyons, Brian Millar formally Davenport Lyons, and Andrew Crossley of ACS Law. In its statement of claim the SRA reportedly argues that between 2006 and 2009 David Gore and Brian Miller were responsible for initiating litigation against thousands of web users alleged to have been involved in unlawful file-sharing, even though they knew there was no sufficient evidence to support some of the claims.²⁵

The letters sent by solicitors to internet subscribers threaten court action for copyright infringement, though as far as we are aware the five default judgment obtained by Davenport Lyons in the PCC are the only instance where Davenport Lyons, ACS Law or other firms engaging in similar activities have brought a court case against consumers. The emphasis of the letters appears to be to extract 'compensation payments' from the accused internet subscribers.²⁶ Michael Coyle, of Lawdit Solicitors who has represented 150 consumers who had been targeted by Davenport Lyons, said the letters usually demanded payment of £400 to £700 and that this is less than it would cost to hire a lawyer to fight the claims. Consumers may also be embarrassed by the letters because some relate to the alleged copyright infringement of adult movies.²⁷

Over the past three years a large number of consumers have come forward stating that they have been accused even though innocent. We therefore have concerns that the method used by some or all of the agencies used by copyright owners to provide the primary evidence in such disputes – the internet protocol (IP) address – has a large margin of error. Issues may also arise if the internet service provider (ISP) does not

²¹ Joshua Rozenberg, [Court victory for computer games firm in crackdown on illegal downloads](#), London Evening Standard, 1 July 2008; [Court orders woman to pay £16,000 for file-sharing](#), Out-Law, Prinsent Masons, 19 August

²² [Topware Interactive Inc – Order Claim No: PAT08023](#), Patents County Court, 21 July 2008

²³ Charlotte Cardingham, [£16,000 \(\\$32,000\) Fine for first Brit convicted of illegal file sharing](#), 19 August 2008

²⁴ [Court orders woman to pay £16,000 for file-sharing](#), Out-Law, Prinsent Masons, 19 August; Joshua Rozenberg, [Court victory for computer games firm in crackdown on illegal downloads](#), London Evening Standard, 1 July 2008

²⁵ [Anti-piracy lawyers knowingly targeted innocent web users, SRA says](#), Solicitors Journal, 18 November

²⁶ See Andrew Murray, [Volume litigation: more harmful than helpful?](#), Society for Computer and Law, 4 February 2010

²⁷ Paul Rodgers, [Solicitors face tribunal over internet copyright claims](#), The Independent, 21 November 2010

accurately match the IP address to a subscriber. It is therefore important that the PCC offers consumers a viable avenue to defend themselves.

The PCC reforms are partly motivated by a desire to make intellectual property litigation cheaper, so that excessive costs do not prevent entrepreneurs and SMEs from defending or bringing a case. Consumer Focus would like the PCC to recognise that consumers, along with entrepreneurs and SMEs, are key stakeholders, and that the PCC process must meet consumer needs. Judging from the cases we are aware of it appears that consumers who cannot afford a solicitor or court proceedings have no choice but to accept outcomes to the dispute which are plainly unfair. Resource inequality will be a factor in most cases where a commercial entity commences copyright infringement proceedings against a consumer. The PCC process should therefore be designed to not put consumers at a grave disadvantage.

Consumer Focus believes it would be beneficial if a review was undertaken into whether, in respect to copyright disputes involving consumers, the PCC performs against its objective of providing an affordable forum for litigation and providing access to justice. There are likely to be few cases, and the cases will have been processed under the old rules and procedures. But we believe that such an assessment would aid understanding of how the PCC procedures need to be reformed to meet the needs of consumers. The current assessment of the success of the new streamlined process should also be undertaken with consumers in mind.

We recommend:

- that the PCC should recognise that consumers, along with entrepreneurs and SMEs, are key stakeholders, and that the PCC process must meet consumer needs

Changes to rules and proceedings of the PCC: impact on consumers

It is acknowledged that the cost of bringing or defending a case in the High Court is a barrier to access to justice in intellectual property matters for individuals and SMEs. Until the recent changes to the PCC's rules and procedures the PCC did not offer a viable alternative to the High Court. Principally because procedure for intellectual property disputes in both courts were similar in process and cost, regardless of the value of the dispute.²⁸ Consumers who had court proceedings initiated against them either in the High Court, or the PCC after the PCC gained jurisdiction over copyright disputes, were faced with substantial cost if they were to defend their case within the prescribed process. Aside from paying for their own solicitor, and barrister if in the High Court, consumers faced substantial costs being awarded against them if they lost.

Nigel Woodhouse had £14,309.52 of claimant's cost awarded against him in a High Court case concerning the copyright infringement of up to three songs. Isabella Barwinska had £10,000 of claimant's cost awarded against her in the PCC concerning copyright infringement of one computer game. With the average salary for full time employed individuals being £25,800²⁹ it is clear that defending a case in the High Court, or the PCC

²⁸ **Patents County Court Reform set to have major impact on intellectual property litigation in the UK**, Field Fisher Waterhouse, October 2004; Intellectual Property Court Users Committee, **Working Group's final report on proposals for reform of the Patents County Court**, July 2009 pg.7

²⁹ **Best paid job: A guide to UK salaries**, ThisIsMoney, November 2009

before changes to rules and procedures were introduced, is beyond the means of most consumers.

In order to improve access to justice for entrepreneurs and SMEs substantial changes were introduced to the PCC's rules and procedure on 1 October 2010. As of 1 October PCC judges will take an active part in case management and wherever possible, the PCC will normally determine the claim solely on the basis of the statements of case and oral submissions. A case management conference will take place approximately two to four weeks after completion of the pleadings. Applications can be made for directions regarding specific, identified issues, such as a request for witness statements, cross examination at trial and written submissions or skeleton arguments. The judge will only make such an order when satisfied that the benefit of the further material in terms of its value in resolving those issues appears likely to justify the cost of producing and dealing with it. Parties will have the option of avoiding a trial by agreeing to a decision on the papers. In deciding whether to transfer a case to the High Court the PCC will consider whether an entrepreneur or SME can only afford to bring or defend the claim in a PCC, and whether the claim is appropriate to be determined by the PCC, particularly regarding the value of the claim, the complexity of the issues and the estimated length of the trial.

The maximum total costs recoverable on the final determination of a claim in relation to liability will be no more than £50,000, and £25,000 on an inquiry into damages or an account of profits. Additional sums may be awarded where a party has behaved unreasonably. Cost recovery is further limited by the Costs Practice Direction which sets a maximum amount of costs which can be recovered for each stage of the action. For example, the maximum sum recoverable for preparing witness statements is £5,000.³⁰

It is obvious that the changes to the rules and procedures were drawn up primarily with SMEs in mind, not consumers. Nevertheless we believe that overall these changes are likely to be beneficial to consumers who are defendants in copyright infringement disputes. We believe that the active role of the judge in case management will help to ensure that consumers are treated fairly and that costs are kept to a minimum. As the Intellectual Property Court Users Committee states 'When exercising his case management powers, the Judge will have the responsibility of ensuring equality of arms between the parties so far as that is possible.'³¹

From a consumer perspective it is welcome that the amended rules and procedures are specifically designed to avoid 'forum shopping' or tactical applications to retransfer cases to the High Court, exposing the other side to a significant and uncertain cost risk.³² Consumers will obviously benefit from the £50,000 cap on recoverable costs and the £25,000 cap on an inquiry into damages, but cost of £50,000 and £25,000 are not affordable for consumers on low or average incomes. Hence the cost of proceeding in the PCC is likely to still present a barrier to many consumers defending their case. We therefore believe that the PCC should evaluate the impact of the changes to its rules and procedures not only in relation to entrepreneurs and SMEs, but also consumers who act as defendants in copyright infringement disputes.

We recommend:

- the PCC should evaluate the impact of the changes to its rules and procedures on consumers acting as defendants

³⁰ **Patents County Court Reform set to have major impact on intellectual property litigation in the UK**, Field Fisher Waterhouse, October 2004

³¹ Intellectual Property Court Users Committee, **Working Group's final report on proposals for reform of the Patents County Court**, July 2009 pg.12

³² *Ibid* pg.10

A modified small claims track at the PCC

Consumer Focus agrees with Lord Justice Jackson that a modified small claims track and fast track should be established for copyright disputes in the PCC. According to the MOJ consideration for this recommendation is pending an assessment of the success of the new streamlined process.³³ Lord Justice Jackson has made this recommendation in view of the likely benefits for freelancers and SMEs and refers to a study undertaken by the Strategic Advisory Board for Intellectual Property (SABIP). The study found that of the over 7,000 freelancers and SMEs who participated in the survey 72.7 per cent were in favour of a fast track and 78.7 per cent in favour of the introduction of a small claims track.³⁴

County Courts usually provide for three tracks through which a claim can be pursued:

- Small claims track – generally for lower-value and less complex claims with a value of up to £5,000 although there are some exceptions
- Fast track – claims with a value of between £5,000 and £25,000
- Multi-track – very complex claims with a value of £25,000 or more³⁵

However, the Civil Procedure Rules CPR 63.1(3) currently requires that any intellectual property claim is classified as multi-track and are therefore ineligible to be determined under a small claims basis. This means that the PCC cannot currently provide a small claims track or fast track for copyright infringement disputes. Disputes must be pursued through multi-track regardless of their complexity or the wish of the claimant or defendant.

The small claims track was originally introduced to County Courts in England and Wales to allow consumers to bring claims. Lord Justice Jackson has recommended that a modified small claims track is introduced to the PCC so that freelancers, such as a journalist whose articles have been reprinted without permission, or a photographer whose photographs have been downloaded from the internet and reproduced without permission, can pursue their claim in the PCC representing themselves.³⁶ We support this recommendation, but would like the MOJ to also consider a modified small claims track specifically designed to allow consumers to defend themselves in copyright infringement disputes. The small claims track has the benefit of no legal costs on either side, and does not require either side to instruct a solicitor.

There is an overriding need for consumers to be able to deal with lower-value copyright disputes without the fearful jeopardy of potential costs in the High Court running to many tens of thousands of pound, or higher. As a result consumers are often forced to capitulate early – and possibly wrongly – to infringement claims asserted by major corporations.

There may be legitimate reasons why such claims might not succeed, eg it was not the putative defendant who carried out the relevant acts, the infringer was not acting with the authority of the defendant, or indeed copyright had not been infringed. However faced with a demand for a licence fee and a contribution towards claimant solicitor costs at the pre-action stage, means that many consumers are effectively forced to capitulate knowing that otherwise they will be faced with a ruinously expensive infringement suit even though the assessable damages may be low. Consumer Focus therefore urges the introduction of a modified small claims track within the PCC in cases of copyright infringement disputes where the likely value of damages is £5,000 or lower.

³³ **Proposals for reform of civil litigation funding and costs in England and Wales**, Ministry of Justice, November 2010, pg.90

³⁴ Lord Justice Jackson, **Review of civil litigation costs: final report**, Ministry of Justice, December 2009, pg.249–250

³⁵ **EX 305 – The fast track and the multi-track in civil courts**, Her Majesty's Court Service, 2009, pg.1

³⁶ Lord Justice Jackson, **Review of civil litigation costs: final report**, Ministry of Justice, December 2009, pg.255–256

Complexity may not make all copyright infringement disputes involving consumers suitable for a modified small claims track. But on the basis that most copyright infringement disputes involving consumers will be up to £5,000 in damages an appropriate small claims track should be introduced to the PCC. A modified small claims track may be particularly suitable for consumers who have admitted to the alleged copyright infringement, or are prepared to do so. In these cases the small claims track and mediation service could provide consumers with a cost-effective way of resolving the copyright dispute and agree to pay damages that are not disproportionate to the actual damage caused by the copyright infringement.

Though, in order for consumers, as well as freelancers and SMEs, to take full advantage of a modified small claims track the PCC needs to provide suitable information about the available tracks. At the moment the PCC process is opaque to the uninitiated, forcing claimants and defendants to seek the advice of lawyers in order to gain a basic understanding of the process. Litigation costs could be significantly reduced if the PCC was to provide appropriate information to both parties to a dispute, similar to the guidance currently provided to consumers on the conventional small claims track in County Courts.³⁷

Liability for copyright infringement is likely to be one of the key issues the PCC will face when seeking to resolve copyright infringement disputes in relation to peer-to-peer file-sharing. This is because such cases are usually brought against the internet subscriber whose IP address is associated with the internet connection that has been used at the time of the alleged infringement. That is, the claim is not brought against the individual suspected of copyright infringement, but the individual who pays the bill for the internet connection that has been used for the alleged infringement. The primary evidence on which copyright owners rely in such cases is an IP address, which does not identify an individual or computer, but is the IP address allocated to the router used to access the internet (multiple computers can access the internet through one router).³⁸ As such the subscriber may have no knowledge of the infringement and who has committed it.

In instances where the internet subscriber is taken to court for copyright infringement they have not committed or authorised, the PCC will have to deal primarily with questions of secondary liability for copyright infringement, ie is the subscriber liable for the copyright infringement that has occurred on their connection. Questions of secondary liability may also arise in cases where the internet subscriber is taken to court and another individual has admitted to the copyright infringement. On the basis that the PCC can draw on existing case law in relation to secondary liability for copyright infringement, such cases could be appropriate for a modified small claims track.

Instances where the defendant questions the reliability of the evidence, for example where an internet subscriber denies that the alleged infringement has occurred on the connection, evidence from the ISP, would be required to establish whether the IP address can be matched to the subscriber's router at the time of the alleged infringement.³⁹ The PCC may also want to examine the process through which copyright owners and their

³⁷ See **EX 305 – The fast track and the multi-track in civil courts**, Her Majesty's Court Service, 2009; **EX306 – The small claims track in civil courts, for people whose dispute has gone to court**, Her Majesty's Court Service, 2010; **EX 307 – The fast track and the multi-track in civil courts**, Her Majesty's Court Service, 2008

³⁸ Copyright owners and their agents obtain IP addresses by scanning peer-to-peer file-sharing networks, particularly BitTorrent networks, for the IP addresses of internet connections used to upload or download their copyrighted content in file format. Other information commonly supplied by copyright owners as part of the evidence include: file name, file hash code, URL of file-sharing tracker, torrent file name, date and time of connection with the tracker, torrent client used, and protocol used

³⁹ IP addresses are allocated on a dynamic basis. So once the copyright owner has obtained an IP address, the relevant ISP has to match it to a subscriber based on the date and time provided by the copyright owner. ISPs hold IP logs for a limited period of time for billing purposes and other purposes as prescribed by law.

agents have obtained the evidence. Conventional small claims track procedures can include witness or experts giving evidence at the hearing, and a 'lay representative' can speak at the hearing for consumers who do not have a solicitor.⁴⁰ As such a modified small claims track in the PCC may be appropriate for copyright infringement disputes where the reliability of the evidence is in question. Particularly because many of the arising issues will not be points of law, but of a technical nature.

With regard to copyright infringement disputes relating to peer-to-peer file-sharing the allocated judge will need to have a good degree of technical knowledge to guard against the claimants dazzling the court with irrelevant 'evidence' and to guard against claimants' own lack of technical expertise. In instances where the reliability of the evidence is disputed, it is important that claimants do not, at great cost, produce general expert witness reports on the process they have used to collect the evidence which are not suitable to establish whether in the particular case the evidence is reliable.

The technical expertise of the claimants should not be assumed. For examples, in the amended particulars of claim in *Polydor Limited and Ors v Woodhouse and Ors*, the defendants are described as 'the registered account holder with an internet service provider in relation to a particular computer' and it is stated that music files 'had been copied onto one or more computers in the possession or control of the defendants that were, at material times, connected to the internet accounts to which each of the defendants had access'. As such the amended particulars of claim wrongly imply that the evidence, ie the IP address, relates to a computer, when in fact it relates to the router to which several computers can be connected. It also wrongly implies that an internet subscriber will have possession or control over the computers which were connected to the internet through a particular router. For example in a shared flat, one of the tenants may be the subscriber to the internet connection to which several computers are connected which are in the possession or control of the other tenants. If the internet subscriber has an open WiFi the computers used to connect to the internet through the internet subscriber's router may not be in the subscribers premises, ie neighbours will be able to connect to the internet using the internet subscriber's router.

The following statements makes it plain that the claimants fundamentally misunderstand what an IP address is: 'the first defendant had an internet account with British Telecommunications plc, which provided an internet connection to a computer which had the following IP address – xxx.xx.xxx.xx, ("the first defendant's Computer")' and 'In the premises of paragraph 27 (the residential address of the internet subscriber during the time of the alleged infringement) the first defendant had infringed...'. Computers do not have IP addresses, routers have, and an IP address does not prove which individual at which premises has committed the alleged copyright infringement. An IP address can only prove that somebody has used the relevant router to connect to the internet and commit a copyright infringement at a particular time not, as the amended particulars of claim state, that 'in the premises as at 26 December 2004 the first defendant had logged-on to the FastTrack network and had made available to the public... the first defendant's infringing sound recording files, by electronic transmission in such a way that... other persons had access to them.'⁴¹

We therefore believe that a strong track allocation process, and case management process thereafter, is a must in copyright infringement disputes relating to peer-to-peer file-sharing. The track allocation and case management processes should be designed to prevent claimants, who in many cases will have a highly respected city law firm at their side, from making tactical applications for cases to be allocated to fast track or multi

⁴⁰ **EX306 – The small claims track in civil courts, for people whose dispute has gone to court**, Her Majesty's Court Service, 2010

⁴¹ *Polydor Limited and Ors v Woodhouse and Ors* (2005) EWHC 3191 (Ch), Amended Particulars of Claim, obtained by Consumer Focus

track, ie tracks which expose consumers to a high cost risk. The technical knowledge a judge will need should not be confused with complexity, and cases should not be allocated to fast track or multi track simply because they require specific technical knowledge. As such we support Lord Justice Jackson's recommendation that one or more district judges, deputy district judges or recorders with specialist experience should be available to sit in the PCC, in order to deal with small claims and fast track cases.⁴² We also agree with the Intellectual Property Court Users Committee that the existing designated Patents Court judges should be able to sit in the PCC if and when required.⁴³

As and when the introduction of a modified small claims track and fast track for copyright infringement disputes is considered, they should be explicitly considered with respect to copyright infringement disputes involving consumers. In relation to conventional small claims track, and consumers' experience of it, we would like to draw attention to our recent report *Small claims, big claims: Consumer perceptions of the small claims process*.⁴⁴ The report cover the experience of consumers as claimants and defendants in the conventional County Court small claims track. We believe it will be useful in establishing a modified small claims track for the PCC. Ideally appropriate small claims and fast track procedures should be operational by the end of 2011, when the implementation of the Digital Economy Act is likely to cause an increase in lower-value copyright disputes.

We recommend:

- the introduction of a modified small claims track for the PCC, designed so that consumers can defend themselves in lower-value copyright infringement disputes
- the introduction of such a modified small claims track by the end of 2011, when the implementation of the Digital Economy Act will lead to an increasing number of lower-value copyright infringement disputes

⁴² Lord Justice Jackson, *Review of civil litigation costs: final report*, Ministry of Justice, December 2009, pg.257

⁴³ Intellectual Property Court Users Committee, *Working Group's final report on proposals for reform of the Patents County Court*, July 2009 pg.13

⁴⁴ See Lola Bello, *Small claims, big claims: Consumer perceptions of the small claims process*, Consumer Focus, October 2010



Consumer Focus response to the consultation on setting the value of claims heard in the Patents County Court

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